INDEX

	PAGE
Statement of the Matter Involved	2
Jurisdiction	3
Statutory Provisions and Rule Involved	3
Questions Presented	4
Opinions Below	4
Specification of Errors	4
Reasons Relied On for Allowance of the Writ	5
Prayer	8

CASES CITED

Bridges v. Wixon, 316 U. S. 135	6
Cooke v. United States, 267 U. S. 517	5
Gompers v. Buck's Stove & Range Co., 221 U. S. 418	6
Grosjean v. American Press Publishing Co., 297 U. S. 233	7
Michael, In re, 326 U. S. 224	5
Nye v. United States, 313 U. S. 33	5
People v. Pirfenbrink, 96 Ill. 68	7
Pendergast v. United States, 317 U. S. 412	6
State ex rel. Grebstein v. Lehrman, 129 So. 818	7
Tumey v. Ohio, 273 U. S. 510	6
United States v. Dochis, 36 F. 2d 601	6
United States v. William Z. Foster et al., C 128-87	2
United States v. Gus Hall	2
United States v. Henry Winston	2
Wilson v. United States, 65 F. 2d 621	6

STATUTES CITED

	PAGE
Federal Rules of Criminal Procedure, Rule 42(a)	2, 3
Judicial Code, Section 240(a)	3
Title 28, U. S. C., Section 1254	3
Title 18, U. S. C., Section 401	3
Frankfurter and Landis, Power of Congress over Contempt, 36 Harv. Law Rev., p. 1027	5
13 Corpus Juris 85	6

Supreme Court of the United States

OCTOBER TERM—1949

No.

GILBERT GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Gilbert Green, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made on July 14, 1949 (R. 69), which affirmed a judgment of the District Court for the Southern District of New York, holding the petitioner in contempt of Court.

Statement of the Matter Involved

The petitioner is a defendant in the case of the *United States* against *William Z. Foster, et al.,* C 128-87, now on trial in the District Court of the Southern District of New York before Judge Harold R. Medina. He has been enlarged on bail of $5,000 since his arrest following the return of the indictment on July 28, 1948. On June 20, 1949, the Trial Judge remanded the petitioner for "the remainder of the trial", because he commented critically on one of the Judge's rulings (R. 7).

The petitioner was testifying during the defendants' case. In the course of an extended colloquy concerning the admissibility of certain documentary evidence, the petitioner said: "I thought we were going to be given a chance to prove our case. That article was germane to the very heart of the issue" (R. 7).* The Court thereupon held him in contempt and imposed punishment. Pursuant to Rule 42(a), Federal Rules of Criminal Procedure, a judgment, commitment and certification were filed the same day. The certificate discloses that the contempt was predicated not only upon the remark made by the petitioner on June 20th, but upon other incidents, involving other defendants, which had occurred as early as May 18, 1949, during the course of the same trial, characterized as "a pattern of misconduct in which the defendant and his co-defendants have engaged for a considerable period of time, as set forth, in part, in the June 8, 1949, orders and certificates, in *United States* v. *Henry Winston* and *United States* v. *Gus Hall*" (R. 15, 16). Appeal was taken to the United States Court of Appeals for the Second Circuit. The appeal was argued on July 1, 1949, and an order was made on July 14th, unanimously affirming the order and judgment below.

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* The proffered exhibit is an article of which the petitioner was co-author and entitled "Notes on American Democracy". The article was later received in evidence as Defendants' Exhibit BBBBBBB-1 (Tr. of Record, *U. S.* v. *Foster et al.,* at p. 9278).

Jurisdiction

The judgment of the Court of Appeals was entered July 14, 1949 (R. 69). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1945, Title 28, U. S. C., Section 1254.

Statutory Provisions and Rule Involved

Title 18, U. S. C., provides in respect to contempt as follows:

> "401. Power of Court.
>
> A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 42(a), Federal Rules of Criminal Procedure, provides:

> "Rule 42. Criminal Contempt.
>
> (a) Summary Disposition. A criminal contempt may be punished summarily if the Judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the Judge and entered of record."

Questions Presented

1. Whether the statement made by the petitioner during the course of the trial constituted a contempt of Court.

2. Whether the Trial Court could find the petitioner guilty of a contempt of Court because of the conduct of other defendants at other times during the trial.

3. Whether the sentence of imprisonment here imposed, i.e., "for the remainder of the trial", considered in the circumstances of this trial, possess the definiteness and certainty of duration and character required by law.

4. Whether such sentence imposes upon petitioner a quality and degree of pressure and compulsion which so curtails the full, free and unobstructed presentation of their defense as to deprive them of their constitutional rights under the Fifth Amendment.

Opinions Below

There was no opinion rendered by the District Court Judge. The opinion of the Court of Appeals is to be found at R. 61.

Specification of Errors

1. The Court of Appeals erred in finding that the petitioner Green had committed an act constituting contempt of Court.

2. The Court of Appeals erred in finding that the acts of other defendants at other times could be imputed to the petitioner to find him guilty of contempt of Court.

3. The Court of Appeals erred in holding that the Trial Judge properly remanded the petitioner "for the remainder of the trial" as punishment for contempt of Court.

Reasons Relied On for Allowance of the Writ

This petition presents two questions of Federal law, important to the administration of federal justice, one of which has been decided by the Court of Appeals in a manner probably in conflict with applicable decisions of this Court; the other is a question which has not been, but should be, settled by this Court. The first is whether an objection to the ruling of a Trial Judge, by a defendant while on the witness stand, can constitute a contempt of Court, either standing alone or in the light of other comments uttered by his co-defendants at other times during the trial. The second is whether the Trial Court commands the power, under the statute, to remand the petitioner "for the remainder of the trial" as punishment for such conduct.

1. The legislative history of the statute conferring upon the federal judiciary the power to punish contempts of Court summarily, and the decisions of this Court construing the statute, demonstrate that it was never intended to protect Judges from objection by this means. *Cooke* v. *United States,* 267 U. S. 517, 539; *Nye* v. *United States,* 313 U. S. 33; Frankfurter and Landis, *Power of Congress over Contempt,* 36 Harvard Law Rev., p. 1027. The power is not inherent; its exercise is permitted only to the extent prescribed by statute and only to protect the Courts against actual interference. *Nye* v. *United States, supra; In re Michael,* 326 U. S. 224. The statute has never been construed to embrace an act merely because it might deter the judicial process. *In re Michael, supra.*

2. If the petitioner's mild and obviously spontaneous comment, made after weeks of an arduous trial, could not be fairly considered contumacious in the light of these expressions by this Court, it could not be made to assume the character of a contempt by reference either to what his

co-defendants had done at other times or to a fancied pattern of misconduct. Contempts should be judged as they occur and an act which is not a contempt in itself cannot be made such by other acts. *Pendergast* v. *United States*, 317 U. S. 412, 420. Nor could the petitioner be punished for the acts of his co-defendants without abandonment of the principle of personal guilt for the doctrine of guilt by association. *Bridges* v. *Wixon*, 316 U. S. 135, 163 (Murphy, J.).

The Court of Appeals disregarded these decisions of this Court and decided these questions in a manner probably in conflict with them.

3. Was the imprisonment here imposed, i.e., "for the remainder of the trial", a sentence definite and certain as required by law? The Court of Appeals decided it was, erroneously, we contend. The requirement of definiteness in punitive, as distinctive from coercive, contempt is well established. *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418; *Wilson* v. *U. S.*, 65 F. 2d 621; *U. S.* v. *Dochis*, 36 F. 2d 601. The contempt sentence "must name a definite period of imprisonment", 13 Corpus Juris 85 and cases there cited. This sentence being punitive is not definite according to the intent of the cases just cited. Its duration depends upon a series of factors so imponderable and unpredictable as to deprive it of all lawful and rational relation to the offense for which it was purportedly imposed. The illness of a juror or witness, protracted rebuttal by the Government the time other defendants consume in presentation of their cases and many other contingencies not difficult to imagine must thus determine the duration of petitioners' imprisonment.

Indeed, by thus making the term of this sentence coextensive with the Government's own rebuttal and cross-examination of the defense witnesses, the Court has, in effect, delegated his judicial sentencing power to the Government prosecutor and has thereby run afoul of this Court's decision in *Tumey* v. *Ohio*, 273 U. S. 510.

Nor is this sentence little different than an imprisonment "until further order of the Court" held to be invalid for want of definiteness in *State ex rel. Grebstein* v. *Lehrman*, 129 So. 818, and *People* v. *Pirfenbrink*, 96 Ill. 68.

The "indeterminate sentence" cases cited by the Court of Appeals do not alter this result. There the mathematical maximum satisfied the requirement of definiteness. Again, unlike here, the indefiniteness is there occasioned by a purpose to rehabilitate, not to punish.

4. Does this sentence compel such a curtailment of the free and unobstructed presentation of petitioner's defense as to be an unconstitutional deprivation under the Fifth and Sixth Amendments?

Whether or not intended, the effect of such a sentence is to pressure petitioner, on pain of continued imprisonment, to hurry his defense to a close. His access to and consultation with counsel and his co-defendants are seriously curtailed. Thus, this sentence is not only inherently indefinite but its duration is in effect limited upon petitioner's involuntary surrender or, serious impairment of constitutional rights which are indispensable to anyone under trial, as they are, for a serious crime. We submit that no sentence should be permitted to stand whose duration, aside from its quantitative uncertainty, is conditioned upon consequences of this character. In the circumstances, we submit that the principle of "undue burden" upon the free exercise of a constitutional right, is not inapplicable. *Grosjean* v. *American Press Publishing Co.*, 297 U. S. 233.

Prayer

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court and that the judgment and decision of the Court of Appeals may be reversed and your petitioner granted such other and further relief as may be just and proper.

Dated, August 11, 1949.

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INDEX

Page No.

CITATIONS

Statute and Rule:

Smith Act, 18 U.S.C. (1946 ed.) 10 1
Rule 42(a), Federal Rules of Criminal Procedure 2

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 259

GILBERT GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

This is a companion case to the *Hall* and *Winston* cases, Nos. 255-258. Petitioner is another of the eleven defendants now on trial in the United States District Court for the Southern District of New York under an indictment based on the Smith Act, 18 U.S.C. (1946 ed.) 10, 13. On June 20, 1949, he was convicted of contempt committed in the presence of the court in the course of the trial, and he was sentenced to imprisonment for the remainder of the trial. The facts relating to the contempt

are set forth in the judgment and certificate (R. 12-16) which the trial judge filed pursuant to Rule 42(a), F. R. Crim. P., as follows:

"On June 20, 1949, at a session of the United States District Court for the Southern District of New York, the defendant Green was on the witness-stand giving testimony on direct examination by his counsel in respect to the charges on trial in *United States* v. *William Z. Foster, et al.*, C 128-87. In the course of the morning session of the Court, the defendant undertook to answer a question which the Court had directed to his counsel, and after several unsolicited remarks by the defendant the Court stated to him:

> 'Why do you keep making these outbursts? There is no question before you and you have been told by me so many times not to do it I should think you could make a special effort and not do it.'

"On the same day, during the afternoon session of the Court, defendant Green's counsel offered a document in evidence. Objection to its admission was sustained. At this juncture the following occurred:

> 'MR. ISSERMAN: I would like to be heard on this, if the Court please. There are five or six or seven different grounds why we deem this article relevant and material to the issues. I would like to be able to state my grounds to the Court.

THE COURT: It seems to me that it represents repetition of the point that has come up in a great variety of ways during the trial here, and I see no necessity for argument.

MR. ISSERMAN: I am asking for an opportunity——

THE COURT: What is that?

MR. ISSERMAN: I am asking for an opportunity to state the grounds.

THE COURT: Yes, I know, but because the question in various forms has so many times arisen here and because of the fact that every time I allow argument the jury is excused and it takes an hour or so before we can calm down again, I find that it is better not to do it. If I felt there was occasion for it I would allow the argument.

MR. ISSERMAN: Can I state for the record my grounds in seeking to have this admitted?

THE COURT: No. I think when a lawyer offers an exhibit, those things are not needed to be stated.

MR. SACHER: Your Honor, this goes to show the intent of this witness. I think that having expressed itself years before the indictment is material.

THE COURT: Mr. Sacher, the intent of these defendants is an intent appearing on the face of the statute and requiring perhaps construction by me, but certainly not an intent as to every detail of every step of everything they do which if we were to stop to have a long statement by

every witness of his intent on everything that he did would unduly prolong the case, and I do not consider it relevant.

MR. SACHER: But Budenz has attacked the intent of every defendant here in regard to democracy and democratic institutions.

THE COURT: Well, Mr. Sacher, I do not desire any argument on this.

MR. ISSERMAN: If the Court please, in respect to this exhibit I would like to make an offer of proof, if I may.

THE COURT: Well, I take the same position that I have previously as to offers of proof. I don't think it is necessary to do it.'

"Immediately, the defendant who had no occasion to speak, turned to the bench and said in an angry, sarcastic manner: 'I thought we were going to be given a chance to prove our case. That article was germane to the very heart of the issue.' The jury was present while defendant Green interrupted the judicial proceedings with his contemptuous statement.

"The misconduct on the afternoon of June 20th was preceded not only by the warning at the morning session of the court, but also by prior misconduct that also had brought forth warnings which had gone unheeded.

"On May 18, 1949, it was necessary to recess the judicial proceedings after the co-defendant Potash had made an outburst in the course of the judicial

proceedings and the defendant Green rose to his feet and commenced talking without the permission of the court. At that time defendant was represented by counsel who was present in the courtroom.

"On May 26, 1949, when the co-defendant Davis similarly rose in the courtroom and commenced an angry outburst in the midst of the judicial proceedings, the Court warned all of the defendants that disorder in the courtroom would not be tolerated. The Court said:

> 'Before you say very much I want to make a little observation. You know, you gentlemen have been bobbing up here, saying things and doing things that I did not consider were very proper to do, some of them rather—well, I won't characterize them because we all remember what you and your other defendants have said and done. This is the first time you have got up. Now I have determined here that I am going to have an orderly trial. I don't think in the early stages that any of you gentlemen really thought I meant what I said or that I would succeed.
>
> * * *
>
> I have penalties at my disposal, if the defendants insist upon interrupting the proceedings and holding forth, although they have lawyers to represent them, and I dislike very much doing some of the

things that the law places it in my power to do.

Now, I just want you to remember that. I believe that the best way to go ahead here is for the defendants to just sit there and let your lawyers represent you instead of jumping up every once in a while to get your own comments in, and your own views, and I tell you, for your own good, that I recommend that.'

"One week later, on June 3, 1949, defendant Green and all his co-defendants, except the defendant Gates, participated in a disturbance in the midst of the judicial proceedings, which led to the conviction for contempt of the co-defendants Hall and Winston. At that time, the Court repeated its warning of May 26th, that 'if there was any further disorder by any of the defendants I should remand them.'

"On June 14, 1949, while the defendant was on the witness-stand, he commenced speaking when he had no occasion to do so. The Court reminded him that his counsel was present and admonished him that he should speak only in answering questions.

"Again, on June 16, 1949, under similar circumstances, defendant Green interrupted colloquy between opposing counsel and the court, and proceeded to make a gratuitous statement. At that time, the Court repeated the admonition to him not to speak 'until a question is put to you.'

"The misconduct on the afternoon of June 20, 1949, was in the teeth of the several prior warnings of the Court and is a part of the pattern of misconduct in which defendant and his co-defendants have engaged for a considerable period of time, as set forth, in part, in the June 8, 1949, orders and certificates in *United States* v. *Henry Winston* and *United States* v. *Gus Hall.*"

Upon appeal to the Court of Appeals for the Second Circuit, the order of the District Court adjudging petitioner guilty of contempt was affirmed (R. 69).

In this Court, petitioner contends, as do Hall and Winston in the companion cases, that his sentence is so indefinite as to be invalid. For the reasons set forth in our brief in opposition in those cases (pp. 10-12), we submit that the contention is without merit.

Petitioner also argues that his misconduct did not constitute contempt. We think a mere reading of the certificate of the trial judge refutes the contention. As the Court of Appeals observed (R. 68), "This record fairly presents a series of events which if allowed to continue in the court room unchecked might well disrupt the trial and so flout the authority of the court that its effectiveness as an instrument of the judicial process would be much impaired if not destroyed. We think it abundantly clear that the petitioner was guilty of a criminal contempt. *Jones* v. *United States,* D. C.

Cir., 151 F. 2d 289; *Cooke* v. *United States*, 267 U. S. 517."

We respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 855737 181